REMARKS

Claims 1-23, 116 and 120-127 are presently subject to examination in this application. Claims 24-41, 47-64, 70-115 and 117-119 are withdrawn, subject to allowance of a linking claim. Claims 126-127 are newly added, offset by cancellation of claims 66-69, which previously had been withdrawn.

Rejection of Claims 1, 4-7, 10-23 and 121-124 under 35 U.S.C. §102(e)

Claims 1, 4-7, 10-23 and 121-124 are rejected under 35 U.S.C. §102(e) as being anticipated by Landvater (US 6,609,101).

In the following discussion, we will use the form [#1], etc. to identify what the Examiner summarized in the office action on page 13-17 as our argument (1), etc. Using this labelling convention, we hope that the differences between our actual argument and the summary to which the Examiner responded will be apparent. As we previously commented on page 17 of our July 14th response, the Examiner has a slight tendency to summarize an argument and then respond to the summary instead of responding to what we wrote. Tracking from one document to the next should help us point out the differences and distinctions between the cited references and the claims.

Claims 1 and 121-124

[#1] In our prior response, it was our position that the Examiner's summary was mistaken. The added claim limitation was a presentation demand type that selects one of a plurality of alternative treatments of presentation demand. It may help the Examiner to think of a presentation demand type as a selector flag that invokes corresponding logic for an alternative treatment of presentation demand. The present wording uses the presentation demand type to select logic to execute. A "presentation demand type" that selects an alternative treatment of presentation demand does not relate to a type of fixture or display used; it selects a mathematical treatment of the forecast demand, irrespective of the number of shelves or the type of fixtures on which goods are displayed. Examples of presentation demand types are given on pp. 4-5 and 14-15 of the application. Added claims 120-125, which depend from claim 1, set forth the alternative mathematical treatments of presentation demand types that are disclosed on the cited pages of the application.

Landvater teaches one treatment of presentation demand for one presentation demand type, not six alternative treatments of presentation demand or even two treatments. Landvater Figures 14-15 illustrate the logic (aka, treatment of presentation demand) in replenishment system 200 for converting shelf configuration into safety stock level and for updating safety stock requirements. *See*, 14:59-15:25. Only one logic is suggested ("calculation of time-phased safety stock levels", col. 14, lines 25-27), without any alternatives. As claims 120-126 present six logics (alternative treatments of presentation demand) and Landvater presents only one, at least five of our treatments are patentable over Landvater as a matter of §102(e).

The Examiner argues (OA at 13) that "Landvater discloses multiple configurations for products on shelves and on display at a retail store, these multiple configurations being alternative ways to handle presentation requirements." Clearly, this is not responsive either to the claim wording or to the argument restated above.

The Examiner goes on (OA at 14) to say that she does not understand our discussion, as she summarizes it. To us, that means that the summary is again mistaken. We amended the claim and then explained what the words of the amendment meant, with reference to the specification. The added claim limitation is best understood in the context of the application pp. 4-5 and 14-15 and the added claims 120-125, which set forth alternative treatments of presentation demand types that appear in the specification. The Examiner is bound to give some weight towards patentability to the added claim limitation. The Examiner has not yet given weight to the added limitation or even suggested what she understands the words to mean.

The closest that the Examiner comes to responding to [#1] is in line 6 of paragraph 2 on page 13, where she equates the presentation configuration to a type, using the parenthetical (or type). It makes no sense, in our view, to equate presentation configuration, which, in Landvater, is a shelf arrangement, to a <u>presentation demand type</u> that <u>selects</u> one of a plurality of alternative treatments of presentation demand. Again, Landvater teaches one treatment of presentation demand, that being to establish a time-phased safety stock level that, in step 226, triggers shipments if on-hand inventory drops below the safety stock on any day of the simulation. *See*, 14:8-9.

[#2] We also pointed out the Landvater does not use presentation demand for promotional forward planning or markdown management. The Examiner effectively

concedes that Landvater does not discuss markdown management. When Landvater talks about promotions, Landvater is clear that safety TIME, not safety stock or presentation demand, is the best way to handle promotions. *See*, 18:32-51 & 18:59-62; 5:42-46. The columns that the Examiner cites, especially columns 17-20, teach away from the conclusion that the Examiner draws. Plainly, Landvater does not combine presentation demand with promotional forward planning as claimed.

To justify withdrawal of the Section 102(e) rejection, we need only point out one difference between Landvater and the claims. For claim 1, we have pointed out several differences. Next, we turn to claims 121-123, which depend from claim 1.

For claim 121, the claim provides, "wherein the presentation demand type selected causes the presentation quantity used by the forecasting program to be the presentation quantity for the selling location on the first day of the predetermined selling period". Landvater, in contrast, uses the presentation quantity for each and ever day of the predetermined selling period, not just the first day. Focusing on promotional goods (which Landvater treats differently, with a safety TIME), protecting the presentation demand on just the first day of the selling period would permit selling goods out of the presentation demand, out of the display. Following this approach, the display would become less attractive, but, for instance, by the time Christmas had passed, the inventory of Christmas tree lights would be closer to sold out than if the display had been fully stocked through December 26th. Landvater makes no hint at treating presentation demand in this way. The Examiner's proposed "official notice" of how retailers plan for displays (OA at 9, paragraph 4, lines 3-4) teaches away from what we claim in claim 121. Similarly, Landvater teaches away from using presentation demand logic during promotions, as explained above. Therefore, claim 121 should be allowable over Landvater.

For claim 122, the claim provides, "wherein the presentation demand type selected causes the presentation quantity used by the forecasting program to be the presentation quantity on the day of the predetermined selling period when the good is received at the selling location". One of skill in the art, reading the specification, would understand that the application uses presentation demand in conjunction with promotional activities, which may be advertising, price or prominent display promotions. Landvater rules out using presentation demand from promotions, especially column 18,

lines 32-51, which teaches very specifically that safety time (which does not involve safety stock) is better than safety stock (which takes into account presentation demand) for promotions. *See, also*, 5:42-46. Therefore, claim 122 should be allowable over Landvater as a Section 102(e) reference.

For claim 123, the claim provides, "wherein the presentation demand type selected causes the presentation quantity used by the forecasting program to be the largest presentation quantity associated with the good at the selling location for any day of the predetermined selling period". Landvater's use of safety stock (col. 14) and daily analysis (col. 15) does not allow protecting the highest presentation quantity during a predetermined selling period, as distinct from the presentation quantity on any particular day. The logic for increasing the safety time for an initial distribution during a promotion is a different approach than using the highest presentation demand during a predetermined period. From the Examiner's emphasis of col. 19, lines 5-17, it is clear to us that the Examiner is confusing safety time with safety stock, neither of which are quite the claimed presentation demand. Therefore, claim 123 should be allowable over Landvater as a Section 102(e) reference.

We note that claims 120 and 125 could be treated similarly, but the Examiner has argued those claims under Section 103(a) instead of 102(e), so we address them below.

Claims 4-7, 10-15

Claims 4-7 and 10-15 should be allowable over Landvater for at least the same reason as the claims from which they depend.

Claims 16-18

Claims 16-18, as amended, include the limitations:

> *wherein the additional analysis programs report aggregated groups of goods in individual selling locations.*
>
> *wherein the additional analysis programs report aggregated individual goods in groups of selling locations.*
>
> *wherein the additional analysis programs report aggregated groups of goods in groups of selling locations.*

In each of the claims, the general "operate on" has been replaced with "report aggregated".

[#3] The Examiner pointed out that "operates on" is very general. We have amended the claims to be more specific.

Claims 19-22

Claims 19-22 should be allowable over Landvater for at least the same reason as the claims from which they depend.

Claim 23

Claim 23 includes the limitations:

> *wherein the analysis generated by the additional analysis programs is utilized as input to an additional process*

This limitation applies to OTB analysis, markdown analysis, and promotion forward buying analysis. The passages cited from Landvater do not use the output of these analyses as input to an additional process in an integrated system. By and large, Landvater does not produce these analyses at all, as discussed above.

This position would have fallen in between [#3] and [#4], if the Examiner had responded. Claim 23 should be allowable for the reasons previously given, to which there was no response.

Rejection of Claims 2, 3, 8, 9, 120 and 125 under 35 U.S.C. §103(a)

Claims 2, 3, 8, 9, 120 and 125 under 35 U.S.C. §103(a) as being unpatentable over Landvater (US 6,609,101).

Claims 2 and 3

Claim 2 includes the limitations:

> *wherein the start date and the stop date are implicitly associated with a memory location in which the presentation quantity is stored*

Claim 3 depends from claim 2.

The limitations of claim 2 admittedly are not found in Landvater. The passages cited by the Examiner include clear reference to explicitly including at least the start date in the shelf configuration database:

> Database 36 preferably stores the following shelf configuration information: the number of facings (product facing the consumer), the minimum number of rows deep required to create an attractive display, the maximum number of rows allocated to this product, the amount of back room safety stock (safety stock maintained in a location other than the store shelf), and the date this configuration becomes effective.

Col. 14, lines 37-45. Clear reference to explicitly associating the start date and the presentation quantity teaches away from this claim.

[#4] The Examiner counters that storing start and stop dates, whether explicitly or implicitly, would be obvious. This begs the question of whether implicitly storing a start date would be obvious from Landvater's teachings. Our position has been that Landvater teaches away from implicitly storing a start date. The cited passages from column 14, lines 25-35 and 55-65 give no hint or suggestion to implicitly store starting dates for a presentation quantity. The Examiner needs to offer more than just her opinion – a declaration, for instance (MPEP § 2144.03) – to overcome Landvater's teaching away.

Therefore, claims 2 and 3 should be allowable over Landvater.

Claims 8 and 9

Claims 8 and 9 should be allowable over Landvater for at least the same reason as the claims from which they depend.

Claims 120 and 125

Claims 120 and 125, which depend from claim 1, include the limitations:

> *wherein the presentation demand type selected causes the presentation quantity used by the forecasting program to be the average presentation quantity for the location during the predetermined selling period.*
>
> *wherein the presentation demand type selected causes the presentation quantity used by the forecasting program to be the presentation quantity for the selling location on the last day of the predetermined selling period.*

The Examiner acknowledges that Landvater does not read on these limitations. OA at 9, paragraph 3 and 10, first full paragraph. On page 10, the Examiner asserts, "Landvater specifically discloses that the specified time is the first day of a selling period." But no supporting citation is given and the Examiner is mistaken, as Landvater tests whether a shipment should be triggered every day, using a calculation specific to that day (either a safety TIME or safety stock calculation.) Cols. 14-15.

[#4.1] As to claim 120, the Examiner proposes to take official notice that "retailers, when planning for a display, plan inventory to fully maintain the display over it's [sic] time period of use." This is an improper use of "official notice," because it is not

true[1/]. For instance, one might expect Christmas displays of seasonal goods to dwindle and not to be fully maintained, because Christmas seasonal goods are supposed to be nearly sold out by December 25th. Even if it were true, it would not make it obvious to use the average presentation quantity for a predetermined period as the quantity to protect. Why would anyone use an average over a period, instead of using the exact number for each day in the period, when simulating day by day? Neither Landvater nor the Examiner suggests a reason. Only the specification of this application explains why. Therefore, claim 120 should be allowable over Landvater.

[#4.2] As to claim 125, the Examiner again proposes to take official notice. The official notice is combined with an obviousness argument, nearly amounting to an argument that any possible way of calculating inventory would be obvious. The official notice and argument stretch too far. The official notice proposes that planning inventory for every day of the year is old and well known, but this is specifically contradicted by Landvater. Landvater explains that planning for every day of the year for every product in a large chain is impractical. *See*, cols. 2-3 ("has not been achieved in actual practice … numerous technical hurdles to overcome") and cols. 23-24. Even Landvater proposes handling many calculations on a weekly basis, instead of a daily basis. Cols. 23-24. It is not allowable for the Examiner to contradict the primary reference by declaring "official notice." Only a declaration subject to contradiction can be used by the Examiner to create evidence that is lacking in and contradicts the references. MPEP § 2144.03.

Applicants respectfully submit that the single reference § 103(a) rejections should be withdrawn.

Rejection of Claim 116 under 35 U.S.C. §103(a)

Claim 116 is rejected under 35 U.S.C. §103(a) as being unpatentable over Landvater (US 6,609,101), in view of the RDG ad, by a division of Display Unlimited (www.displayunlimited.com).

Claim 116 includes the limitations on what the presentation calendar includes:

[1] Should the Examiner persist in asserting "official notice", we expect the Examiner to comply with MPEP § 2144.03 and submit a declaration that is subject to rebuttal testimony.

> *a schedule of display fixtures including fixture identifiers for a plurality of fixture types and quantities of the fixtures present at particular selling locations; and*
>
> *one or more PQ tables, the PQ tables associating with a plurality of good-selling location pairs, data including the fixture identifier, the good identifier, the selling location identifier, and the one or more presentation quantities each associated with the start and stop dates*

We note that new claim 127 has limitations similar to claim 116.These limitations are not found in Landvater, as the Examiner acknowledges.

[#5A] The RDG ad cited to counter claim 116 is a furniture advertisement, which a programmer would not select as a reference to improve on Landvater. It nothing to do with software design. One of ordinary skill in the art would be more likely to use Display Limited to furnish their office for walk-in software sales than to view it as an inspiration for software design. The reference does not teach providing an intermediate abstraction layer.

This claim makes it clear that the schedule of display fixtures, including fixture identifiers for multiple fixture types, provides an intermediate abstraction in software for a variety of physical fixture types (Applic. 8-9) used for retail display.

The Examiner counters that Landvater could rewrite the program to add an intermediate layer of abstraction "capable of storing displays in memory." The ad for furniture and consulting services was "merely relied on to teach different fixture types" used in a retail environment. So, neither Landvater nor the RDG ad teaches an intermediate layer of abstraction.

[#5B] The whole argument in the main paragraph of page 16 is bootstrapping apparently intended to render Landvater's program capable of being modified to do what is claimed. We both agree that neither Landvater nor the RDG ad teaches the claimed intermediate layer of abstraction. So no amount of stretching the word "configuration" or "display" in Landvater reads on the claimed abstraction layer. The possibility of rewriting a program to add a feature that none of the references teach or suggest is not a sound basis for a Section 103(a) rejection.

[#5C] Because the RDG ad does not teach anything about adding an intermediate abstraction layer (and we never pretended to invent retail display fixtures), the Examiner is essentially left defending a single reference Section 103(a) rejection.

Real evidence is required, in the form of a teaching or suggestion or motivation to modify a single reference as the Examiner proposes. *See, e.g., In re Kotzab*, 217 F.3d 1365, 1369-70 (Fed. Cir. 2000) (rev'd finding of obviousness, as "Even when obviousness is based on a single prior art reference, there must be a showing of a suggestion or motivation to modify the teachings of that reference."); *Kolmes v. World Fibers Corp.*, 107 F.3d 1534, 1541 (Fed. Cir. 1997) (aff'd patent not invalid, as no suggestion to modify the '989 patent with regard to non-metallic fibers). The *Kolmes* case is particularly telling, given the relatively minor change to the reference, which was not proven to be suggested by the prior art. The lack of objective evidence of a suggestion or teaching to ad an intermediate abstraction layer is good reason to reconsider this § 103(a) rejection.

[#5D] In this case, it is not enough to shrug and say that all obviousness involves some degree of hindsight. The Examiner has not pointed to anything in the references that suggests or teaches adding an intermediate abstraction layer for display fixture types to Landvater. This is all hindsight, to the nth degree, 100 percent hindsight. The cases previously cited to not allow this degree of hindsight to be a basis for a Section 103(a) rejection.

[#5E] It is Applicant's position that it was not obvious in 1999 or 2001 that introducing another layer of abstraction would lead to the data entry efficiencies that users of Bluefire's software have realized. Adding display fixture types as an intermediate layer created extra work to set up the display fixture types, inventory the stores for fixtures and use the fixtures for presentation demand analysis. This extra work would tend to discourage users from requesting such a feature and would tend to discourage analysts from proposing such a feature. The extra work required to set up and use a display fixture abstraction layer made it nonobvious, in my opinion, to introduce this feature.

One of skill in the art would not select the RDG ad as a source for modification of Landvater's software because it is general, uninformative and unrelated to software design. It does not teach modifying software by adding an intermediate abstraction layer that includes display fixture types.

One of skill in the art would not combine the Landvater software system and the RDG ad to introduce an intermediate abstraction layer that includes display fixture types.

Therefore, claim 116 and the newly introduced claim 127 should be allowable of the art of record.

CONCLUSION

Applicant respectfully submits that the pending claims are now in condition for allowance and thereby solicit acceptance of the claims as now stated.

Applicant would welcome an interview, if the Examiner is so inclined. The undersigned can ordinarily be reached at his office at (650) 712-0340 from 8:30 a.m. to 5:30 p.m. PST, Monday through Friday, and can be reached at his cell phone at (415) 902-6112 most other times.

Fee Authorization. The Commissioner is hereby authorized to charge any additional fee(s) determined to be due in connection with this communication, or credit any overpayment, to our Deposit Account No. 50-0869 (BLFR 1005-1).

Respectfully submitted,

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